Supreme Court, U.S.
FILED
DEC 15 1994
OFFICE OF THE CLERK

No. 94-991

In The

Supreme Court of the United States

October Term, 1994

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, AND VERNIE RHODES, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J. PATRICK LOGAN
BURR & FORMAN
420 20th Street North
3000 SouthTrust Tower
Birmingham, AL 35203
Telephone: (205) 251-3000

Counsel of Record

WILLIAM C. KNIGHT, JR.
JENNIFER M. BUSBY
BURR & FORMAN
420 20th Street North
3000 SouthTrust Tower
Birmingham, AL 35203

Counsel for Respondents, Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis and Vernie Rhodes, Jr.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, preempts a state law fraud claim which does not "relate to" an employee benefit plan as defined by § 514(a) of ERISA.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are reflected in the case caption. Respondents Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr., are listed individually.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 5

A. THE ELEVENTH CIRCUIT PROPERLY CONSIDERED *INGERSOLL-RAND v. McCLENDON*, AND RENDERED ITS DECISION CONSISTENT THEREWITH 5

B. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Chatman v. Saks Fifth Ave. of Texas, 762 F. Supp. 152 (S.D. Tex. 1991) 8

Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir.), *cert. denied*, 113 S.Ct. 68 (1992) 8

District of Columbia v. Greater Washington Bd. of Trade, 113 S.Ct. 580 (1992) 5, 10

Epps v. NCNB Texas, 7 F.3d 44 (5th Cir. 1993) 8

Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 412 (1992)..... 4

Hospice of Metro Denver, Inc. v. Group Health Ins. of Okl., Inc., 944 F.2d 752 (10th Cir. 1991)..... 8

Howard v. Indiana Michigan Power Co., 812 F. Supp. 135 (S.D. Ind. 1992) 8

Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987)..... 8

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 5, 6, 7, 10

Klank v. Sears, Roebuck and Co., 735 F. Supp. 260 (N.D. Ill. 1990) 8

Moore v. Philip Morris Companies, Inc., 8 F.3d 335 (6th Cir. 1993)..... 7

Nowac v. Rheem Mfg. Co., 772 F. Supp. 977 (S.D. Tex. 1991) 8

Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989)..... 8

TABLE OF AUTHORITIES – Continued

Page

Roney v. Nationsbank Corp., 799 F. Supp. 670 (N.D. Tex. 1992) 8

Rozzell v. Security Servs., Inc., ___ F.3d ___ 1994 WL 619651 (5th Cir. 1994) 8, 11

Sanson v. General Motors Corp., 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1578 (1993) .. 6, 7, 10

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) 8

Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994) 7, 8

STATUTES

28 U.S.C. § 1254(1) 2

Section 514(a), 29 U.S.C. § 1144(a) 2, 6, 10

No. 94-991

In The

Supreme Court of the United States

October Term, 1994

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, AND VERNIE RHODES, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondents, Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr., respectfully pray that this Court will enter an order denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the Petitioner, Sears, Roebuck and Co. ("Sears").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 30 F.3d 1402 (*"Forbus II"*). Pet. App. 1-12.[1] The relevant District Court's orders are those contained in Petitioner's Appendix at pages 17-22. The District Court's Memorandum Opinion contained in Petitioner's Appendix at pages 23-27 is not relevant to the matters sought to be reviewed by this Petition. Pet. 5. The prior opinion of the Court of Appeals is reported at 958 F.2d 1036. Pet. App. 32-49.

JURISDICTION

The Respondents concur in the Petitioner's Statement of Jurisdiction insofar as review is sought pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The ERISA provision at issue in this case is Section 514(a), 29 U.S.C. § 1144(a), which provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

[1] References to the Appendix filed by Sears with its Petition will be abbreviated as "Pet. App." followed by the page number. References to Sears Petition for Writ of Certiorari will be abbreviated as "Pet." followed by the page number.

described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

Respondents were employed by Sears, Roebuck and Company at a Retail Distribution Center ("RDC") in Birmingham, Alabama. Pet. App. 2. The RDC was used by Sears to both store and distribute merchandise to various retail outlets as well as customers' homes. *Id.* at 2-3. In late October or early November, 1989, Mr. Neal Owings ("Owings"), General Manager of RDC, announced at several employee meetings that the company would close and shut down the warehouse facility. *Id.* at 3. Mr. Owings explained that the facility would be shut down, and thus, employment at the facility would be terminated effective December 31, 1989. *Id.*

At later meetings, the Respondents received a booklet which represented Sears' program or plan (the "Retirement Incentive Package" or the "package") applicable to employees by the closing of one of its facilities. *Id.* Sears advised the Respondents that they had no choice but to participate in the program, sign the release, and elect the package of options, because failure to do so would result in termination as of December 31, 1989, without any benefits. *Id.* Nevertheless, each of the Respondents expressed desire for continued employment with Sears; they did not want to retire. *Id.* Sears reiterated that the Respondents had no choice but to "voluntarily" retire. *Id.* Faced with the prospect of termination on

December 31, 1989 with no benefits, each of the Respondents reluctantly elected "voluntary" retirement and participation in the program. *Id.*

Sometime in January, 1990, the Respondents learned that the warehouse would not close but, rather, would become a Cross-Dock Center ("CDC"). *Id.* Consequently, they requested reinstatement to their former positions, but were told that their positions were no longer available. *Id.* In fact, the Respondents' former positions were never eliminated. *Id.* Furthermore, the Respondents' positions were filled by younger and less senior employees than the Respondents. *Id.*

Respondents brought suit against Sears based on Sears' false representations concerning the closing of the facility. Contrary to Petitioner's assertions, the Respondents have *never* alleged that Sears misrepresented any portion of the Retirement Incentive Package. Rather, as found by the Eleventh Circuit in *Forbus II*, "the crux of the [Respondents'] complaint is the fraudulent inducement to resign based on the closing of the facility."[2] Pet. App. 4.

---

[2] Petitioner cites certain facts and circumstances surrounding the Respondents' signing of the releases and waivers as though there still exists an issue as to whether Petitioner obtained these releases and waivers through fraud, duress, or otherwise involuntarily. Pet. 3. This issue was previously decided by the Eleventh Circuit in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 412 (1992) ("*Forbus I*"), wherein the court specifically held that the Respondents could assert fraud claims under Alabama law because they were fraudulently induced to resign their positions with Petitioner. Pet. App. 4, 32-49.

REASONS FOR DENYING THE WRIT

Review by this Court of the decision below is neither necessary nor warranted. *First*, the Eleventh Circuit properly considered *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990) and rendered its decision consistent therewith. The Eleventh Circuit's decision neither calls into question the validity of *McClendon* nor represents an unwarranted restriction of that holding. *Second*, the issue of whether ERISA preempts a state law claim that former employees were fraudulently induced to enter into an ERISA-qualified severance plan is not the claim made by Respondent in their complaint nor is it the question before the Court. Rather, the question presented is whether ERISA preempts a state law fraud claim that does not "relate to" an employee benefit plan. *Third*, the Eleventh Circuit's opinion does not conflict either directly or "in principle" with the other circuits because the circuits are uniform in their opinions that only state law claims which "relate to" employee benefit plans are preempted by ERISA.

A. THE ELEVENTH CIRCUIT PROPERLY CONSIDERED *INGERSOLL-RAND v. McCLENDON*, AND RENDERED ITS DECISION CONSISTENT THEREWITH.

Petitioner maintains that *certiorari* is proper in this case because there exists confusion[3] among the lower

---

[3] Petitioner's basis for this alleged "confusion" is a footnote in Justice Steven's dissenting opinion in *District of Columbia v. Greater Washington Bd. of Trade*, 113 S.Ct 580, 596 n.3 (1992) (Stevens, J. dissenting), wherein he notes the number of cases which cite *McClendon*, and the dissenting opinion of Judge Birch

courts with respect to the application of *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990) to state laws of general application. Pet. 5. Petitioner further asserts that, as a result of this alleged "confusion", the Eleventh Circuit either failed to consider properly *McClendon* or applied its holding in an unduly restrictive manner. *Id.* at 5-8 and n. 3. This argument is wholly specious. First, there is no confusion among the lower courts with respect to the application of *McClendon* to state laws of general application. As with the other lower courts, the Eleventh Circuit's decision was based on the "relate to" language of § 514(a) of ERISA.

Second, not only did the Circuit Court consider *McClendon*, but also, it specifically distinguished *McClendon* on the basis that the plaintiff "sought damages due to the loss of his *pension benefits plan*" and that "[t]his fact was of critical importance to the Court." Pet. App. 9; 30 F.3d at 1406 (emphasis in original). In contrast, the *Forbus II* court held:

> [T]he [Respondents'] claims in the case center on Sears' alleged fraud concerning ***the elimination of the [Respondents'] jobs, not fraud concerning an ERISA plan or any other benefit package.*** The [Respondents] have not claimed any fraud as it relates to the amount of pension benefits received, nor have the [Respondents] made any allegations that Sears misrepresented

---

in *Sanson v. General Motors Corp.*, 966 F.2d 618, 625 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1578 (1993) (Birch, J., dissenting). Pet. App. 8-9. Neither of these dissents demonstrate the alleged "ongoing confusion" which Petitioner asserts exists among the lower courts.

> the availability of pension benefits to the plaintiffs. Simply put, the [Respondents] contend that Sears lied when it informed them that their jobs were being eliminated.

Pet. App. 9-10; 30 F.3d at 1406 (emphasis added). In sum, as recognized by the Eleventh Circuit, the employee in *McClendon* "was unlawfully discharged to prevent his *attainment* of benefits under a plan covered by ERISA", *McClendon*, 498 U.S. at 135, whereas, in this case, the existence of an ERISA plan is not a factor, let alone a critical factor, in establishing Petitioner's liability for fraud.[4] In addition, Petitioner references several other circuit court decisions as conflicting "in principle" with *McClendon*. These references are wholly specious as each of these decisions are excellent examples of state law claims which clearly "relate to" an employee benefit plan under any interpretation of *McClendon*. Pet. 12-13. *See Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994) (state law claims regarding failure of company to disclose its consideration of enhanced severance program are preempted by ERISA); *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 341 (6th Cir. 1993) (Kentucky law providing for the disbursement of a decedent's estate – specifically

---

[4] Petitioners also maintain that *Forbus II* conflicts with the Eleventh Circuit's decision in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992). Pet. 12, n. 5. However, the Eleventh Circuit addressed this issue in *Forbus II*, finding that "just as in *McClendon*, the existence of a pension plan was 'critical' to the case." Pet. App. 10; 30 F.3d at 1406 (citing *Sanson*, 966 F.2d at 621). The *Forbus II* court further noted that "the present case is distinguishable in that Sears' alleged misrepresentation did not involve a benefit plan – it involved the very existence of the [Respondents'] jobs." Pet. App. 11; 30 F.3d at 1406.

regarding pension benefits – is preempted by ERISA); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) (ERISA preemption appropriate where plaintiff brought suit to enforce oral promise by his employer to pay additional pension benefits); *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218-1220 (5th Cir.), *cert. denied*, 113 S.Ct. 68 (1992) (ERISA preemption appropriate where the basis of the employee's claims against employer was operation of a pension plan and amendments thereto, and also, recognizing that there are cases of fraudulently induced retirement that do not "relate to" a plan). In fact, the *Forbus II* court specifically cited *Vartanian* and *Moore* as examples of where "the relationship between the state law and an employee benefit plan has been clear." Pet. App. 11; 30 F.3d at 1407.[5] "Such a clear connection is

---

[5] Furthermore, notwithstanding Petitioner's argument to the contrary, there is no conflict among the circuits with respect to the issue of whether the fact that a plaintiff's damages may be affected by a calculation of pension benefits is sufficient to warrant preemption. Pet. 14, n.7. It is not. *See Rozzell v. Security Servs., Inc.*, ___ F.3d ___ 1994 WL 619651 *2 (5th Cir. 1994); *Hospice of Metro Denver, Inc. v. Group Health Ins. of Okl., Inc.*, 944 F.2d 752 (10th Cir. 1991); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989); *Howard v. Indiana Michigan Power Co.*, 812 F. Supp. 135 (S.D. Ind. 1992); *Klank v. Sears, Roebuck and Co.*, 735 F. Supp. 260 (N.D. Ill. 1990); *Roney v. NationsBank Corp.*, 799 F. Supp. 670 (N.D. Tex. 1992); *Nowac v. Rheem Mfg. Co.*, 772 F. Supp. 977 (S.D. Tex. 1991); *Chatman v. Saks Fifth Ave. of Texas*, 762 F. Supp. 152, 153 (S.D. Tex. 1991). Indeed, Petitioner's reliance on *Epps v. NCNB Texas*, 7 F.3d 44, 45 (5th Cir. 1993) is wholly misplaced. First, *Epps* concerned a state law claim for breach of an obligation to pay severance benefits, again, a claim which clearly relates to an ERISA benefit plan. Second, the Fifth Circuit recently clarified in *Rozzell v. Security Servs., Inc.*, ___ F.3d ___, 1994 WL 619651 *2 (5th Cir. 1994) that referral to a pension plan

lacking here; in this case, the Alabama law governing fraudulent misrepresentation does not "relate to" an employee benefit plan." Pet. App. 11-12; 30 F.3d at 1407.

B. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

Petitioner attempts to posit the issue before this Court as to whether ERISA preemption is appropriate where former employees assert a state law fraud claim alleging that they were fraudulently induced to enter into an ERISA-qualified severance plan and where liability under that state law depends upon an ERISA plan. Pet. i. This is not the claim made by Respondents; was not the legal issue before the court below; and cannot be presented to this Court just because Petitioner wants to define the issue in this fashion to fit its view of the case. Indeed, the specific issue addressed by the *Forbus II* court was whether Respondents' claim concerning ***the elimination of their jobs*** was preempted by ERISA even though the Respondents did not claim any fraud relating to the amount or availability of pension benefits. "Simply put the [Respondents] contend that Sears lied when it informed them that their jobs were being eliminated." Pet. App. 9-10; 30 F.3d at 1406. Consequently, the *Forbus II* court properly concluded:

---

to compute damages "does not, and cannot, mean that any lawsuit in which reference to a benefit plan is necessary to compute plaintiff's damages is preempted by ERISA and is removable to federal court."

> ERISA preemption is not without boundaries. In the present case – in which ERISA applies peripherally, if at all – it would defy common sense to allow ERISA to preempt a state law fraud claim. The Alabama fraud statute at issue in this case does not require the establishment or maintenance of an ongoing plan, makes no reference to an ERISA plan, and functions irrespective of any such plan. *Sanson*, 966 F.2d at 621.

Pet. App. 12; 30 F.3d at 1407.

Petitioner, however, calls upon this Court to abandon the central preemption determination requirement of § 514(a), as recognized by this Court in *McClendon*, that courts determine whether state claims "relate to" an employee benefit plan and, instead, asks this Court to adopt a bright-line test for ERISA preemption of state laws of general application. Such a result is contrary to *McClendon's* holding that the "key to § 514(a) is found in the words 'relate to' ", *McClendon*, 498 U.S. at 138; that the "existence of a pension plan [be] a critical factor in establishing liability under . . . [state] law", *id.*, at 139-40; that there are "recognized limits to ERISA's pre-emption clause", *id.*;[6] and that ERISA preemption is not

---

[6] The Eleventh Circuit has also recognized the limits of ERISA preemption in *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1578, 123 L.Ed.2d 146 (1993), holding "that a law normally would not be preempted if the statute did not require the establishment or maintenance of an ongoing plan, or if a statute makes no reference to, or functions irrespective of, a plan." *Id.* at 621. *See also District of Columbia v. Greater Washington Board of Trade*, 113 S.Ct. 580, 583 n.1 (1992) (recognizing that not every cause of action which

appropriate where a generally applicable statute "makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan", *id.* at 139. *See also Rozzell v. Security Servs., Inc.*, ___ F.3d ___ 1994 WL 619651 (5th Cir. 1994)

In sum, Petitioner's contention that the Eleventh Circuit's decision will deter national employers from offering severance packages as an incentive for early retirement and will defeat the public policy of encouraging uniformity in benefit plan administration is wholly fictional.

CONCLUSION

For all the foregoing reasons, Sears' Petition for Writ of Certiorari should be denied.

J. PATRICK LOGAN
BURR & FORMAN
420 20th Street North
3000 SouthTrust Tower
Birmingham, AL 35203
Telephone: (205) 251-3000

Counsel of Record

WILLIAM C. KNIGHT, JR.
JENNIFER M. BUSBY
BURR & FORMAN
420 20th Street North
3000 SouthTrust Tower
Birmingham, AL 35203

Counsel for Respondents, Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis and Vernie Rhodes, Jr.

---

remotely touches an ERISA plan is preempted); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987) (holding that "some state laws affect employee benefit plans too tenuously to be characterized fairly as relating to employee benefit plans").